

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MIKE NEWBERRY)	
Claimant)	
VS.)	
)	Docket No. 250,386
LAFORGE & BUDD CONSTRUCTION COMPANY)	
Respondent)	
AND)	
)	
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from a preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on November 16, 2001.

Issues

The Administrative Law Judge (ALJ) found: 1. Claimant was a self-employed subcontractor. 2. Money was withheld from claimant by respondent to pay for workers compensation insurance. 3. Claimant's earnings were included in the payroll the insurance carrier used to calculate respondent's workers compensation insurance premium. As a result, the ALJ found claimant's injury was covered by the Workers Compensation Act and ordered preliminary benefits. Respondent and its insurance carrier contend the ALJ erred in that claimant was not an employee of respondent and, therefore, the Workers Compensation Act does not apply to this claim. Claimant argues that respondent and its insurance carrier should be estopped from denying that the Act applies and that there was workers compensation insurance coverage.

Findings of Fact and Conclusions of Law

After reviewing the record and considering the evidence, the Appeals Board (Board) concludes the Order should be affirmed.

Claimant injured his left knee on October 6, 1999 while performing work for respondent. The facts defining the relationship between claimant and respondent were discussed in the Board's previous Order, dated April 28, 2000. Those facts are familiar to the parties and need not be repeated herein. Suffice it to say that the Board found those facts indicated claimant was an independent contractor rather than an employee of respondent.

A subsequent preliminary hearing was heard by the ALJ on October 31, 2001, at which time new evidence was presented including the fact that respondent had withheld money from claimant's pay for the purchase of workers compensation insurance and that claimant's pay was included in respondent's payroll by the insurance carrier for the purpose of calculating respondent's workers compensation insurance premium.

Q. (Mr. Clements) There was a question whether or not you had Workers' Compensation coverage through LaForge and Budd, is that true?

A. (Mr. Newberry) How now?

Q. You questioned LaForge and Budd about Workers' Compensation insurance for the job that you performed for them, did you not?

A. Yes.

Q. Who did you contact in that regard?

A. First I talked to Bill LaForge and then Greg LaForge filled out the papers.

Q. What was your understanding as to whether or not you had coverage at the time you performed the work for them?

A. I thought I had it.

Q. What made you think that you had coverage through LaForge and Budd?

A. Because they had been taking it out of my check since January of '96.

Q. You had worked for LaForge and Budd other than the project on which you were injured, is that correct?

A. Yes.

Q. Approximately how many different jobs did you perform for LaForge and Budd since 1996?

A. Up to that time around 35 jobs.

Q. Have you performed work for them since that time?

A. Yes, I have.

Q. And it was your understanding they were taking money out to cover you for Workers' Compensation?

A. Yes, they was taking 41 something percent for all the labor.

Q. At some point in time we were we able to get our hands-on an audit which I shared with you, the audit report I sent to you with what has been marked as Claimant's Exhibit 1?

A. That paper you showed me?

Q. Yes.

A. Yes.

Q. Did that have Newberry Flooring listed as an insured?

A. Yes.

Q. Did that reflect that they had actually taken money from you for Workers' Compensation coverage?

A. Yes.

Q. Approximately two years after your injury did you receive a check from LaForge and Budd which you did not understand?

A. Yes.

Q. What did you do when you got that check?

A. I called Rick Butler and he told me that was for the money they had taken out of my check for Work Comp.

Q. And approximately when did you receive the check?

A. Probably like July 8th because they sent it on July 6.

Q. Judge, this copy did not come off very well. Mike, would you read the date on that postmark?

A. Let me put my glasses on. I think it says July 6.

Q. Of what year?

A. Of this year, 2001.

Q. So basically your understanding is that they were withholding money from your paycheck to cover you for the Work Comp. And then two years later they sent that money back to you?

A. Yes.

Q. Did they send the money back for all four years that you performed work for them or simply for the year of 1999?

A. That's just the last year they sent me money back for.¹

Claimant now argues, in part, that respondent should not be permitted to deduct monies from claimant's pay for workers compensation insurance and then deny that claimant's injury is covered under the Act.² A Similar question was presented to the Board in the case of *Kidwell v. Advanced Home Design, Inc.*, WCAB Docket No. 250,852 (May 2000). In that case the Board held:

In some states, the purchase of insurance coverage is considered to control or override other factors. *Larson's Workers' Compensation Law*, Sec. 63.04. Such a rule helps bring certainty and assigns responsibility where there will be coverage. The respondent is then estopped from denying claimant was its employee. The parties' agreement is enforced in the workers compensation proceedings. The Board might agree with enforcing a clear promise to provide coverage as an employee.

But in this case, it is not clear that respondent was promising to provide workers compensation coverage for claimant as its employee. The written agreements required claimant to purchase workers compensation insurance as a subcontractor and stated claimant would not be covered by respondent's insurance. This portion of the written agreement was verbally modified. Respondent advised claimant that if claimant did not purchase the insurance, respondent would withhold money to purchase insurance. It appears that if respondent purchased insurance it could, and would most

¹ Tr. of Prel. H. at 6-9 (Oct. 31, 2001).

² See *Stonecipher v. Winn-Rau Corp.*, 218 Kan. 617, 624, 545 P.2d 317 (1976). See also 6 *Larson's Workers' Compensation Law*, § 102.01[4] (2000).

consistent with the written agreement, have been for claimant as an independent contractor, either to cover claimant as a self-employed independent contractor pursuant to election under K.S.A. 44-542a or to cover claimant's employees. If the agreement were enforced, claimant would be the one the claim would be against with the claim paid by insurance respondent had paid for out of the money withheld. There is no indication insurance was ever purchased. This leaves a contract question which, as the ALJ pointed out, is outside the Board's jurisdiction. See, e.g. *Superior Insurance Company v. Kling*, 327 S.W. 2d 422 (Tex. 1959).

Kansas has applied the doctrine of equitable estoppel in workers' compensation proceedings.³ In *Scott v. Wolf Creek* the Court of Appeals held that the employer was not estopped from asserting the exclusive remedy provision of the Workers Compensation Act despite the fact that the employer told the employee's widow that workers compensation benefits were not available. Relying on the employer's representation, the employee's widow delayed filing a worker's compensation claim. The Court of Appeals did rule, however, "that estoppel would be available to plaintiffs in workers compensation proceedings and the issue should be resolved in that forum."⁴ Estoppel was later applied in the subsequent workers compensation action brought by Scott's widow to toll the running of the written claim statute.

In *Marley v. M. Bruenger & Co., Inc.*, the Kansas Court of Appeals held claimant to the terms of his written agreement with respondent by finding claimant was estopped from denying he was an independent contractor.

The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction wholly inconsistent with his or her previous acts and business connections with such transaction.⁵

Also, the agreement between Marley and M. Bruenger & Co., Inc., specifically dealt with the question of workers compensation insurance. It placed the burden of obtaining coverage on the claimant. In this case there was no such contract or agreement. Furthermore, in this case it is clear that claimant believed the money respondent was withholding from his pay was for the purpose of obtaining workers compensation insurance coverage on him, not just his employees. The fact that respondent was withholding from the gross amount of claimant's pay shows that the coverage was not limited to claimant's employees, if any. This is further evidenced by the insurance company's audit documents

³ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d, 501, 6 P.3d 421 (2000); *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d 156, 928 P.2d 109 (1996).

⁴ *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d. at 162-163.

⁵ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d at Syl.¶ 1.

that show respondent's premium was calculated using the total amount respondent paid to claimant, not just the amount claimant paid his employees. Likewise, respondent's office manager, Anita Lawrence, testified that she believed claimant was covered by respondent's workers compensation insurance when she submitted the accident report to the insurance company and/or the insurance agent.

Respondent and/or its insurance carrier now argue that withholding money from claimant was a mistake. But respondent started collecting money from claimant for workers compensation over three years' before the date of claimant's accident. The fact that almost two years' after claimant's accident respondent attempted to refund some of that money does not change anything.

Regardless of whether claimant elected to come under the Workers Compensation Act as a self-employed independent contractor by paying respondent to provide workers compensation insurance coverage or, if instead, claimant is to be treated as an employee of respondent for purposes of the Workers Compensation Act, respondent is estopped from denying that the Act applies to this claim. Whether or not there is insurance coverage is a separate contract question between respondent and its insurance carrier.⁶ As claimant's right to collect preliminary hearing benefits is not affected by that contract question, that is not a jurisdictional issue.⁷

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on November 16, 2001, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2002.

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

⁶ *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan. App.2d 492, 794 P.2d 662 (1990).

⁷ K.S.A. 44-534a(a)(2); *See Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

